In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 709

MARTHA G. WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. i-v) is not yet officially reported.

JURISDICTION

The opinion of the court of appeals was filed on October 7, 1968. (Pet. i.) The petition for certiorari was filed on November 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's refusal to place petitioner on probation and to suspend execution of sentence, wholly or partly on the ground that petitioner refused, even after affirmance of her conviction, to admit her guilt, constituted reversible error.

2. Whether, upon her motion to correct or reduce sentence, petitioner was entitled to introduce evidence designed to show that she was innocent of the crime for which she was sentenced and that conviction was obtained by evidence known to the prosecutor to be false.

STATUTE AND RULE INVOLVED

18 U.S.C. 3651:

Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as

well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

* * * *

Rule 35 of the Federal Rules of Criminal Procedure:

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

STATEMENT

After a jury trial, petitioner was convicted on two counts of willful attempt to evade her federal income tax for 1958 and 1959. The district court denied her application for probation and imposed a one year sentence on each count, the sentences to run concurrently. In her original appeal, petitioner contested only the conviction and not the legality or propriety of the sentence. (Pet. i-ii.) The court of appeals affirmed the conviction. *Whitfield* v. *United States*, 383 F. 2d 142, 145 (C.A. 9).

On the day when the mandate of the court of appeals issued, petitioner filed in the district court a motion, purportedly under Rule 35 of the Federal Rules of Criminal Procedure, to correct or reduce the sentence. The district court denied the motion. (Pet. i.) At the hearing on the motion, the court made the following observations (II-R. 11-13):[1]

> THE COURT: My point is that that is what the probation officer had in mind in his report, that there is nothing that he can do to help Mrs. Whitfield. This isn't a case for rehabilitation, which is what the probation officer would be working on, so I think that that is what he had in mind.
>
> The matter of sentence is left up to me as to whether to give her ten years or $20,000 fine and I just though I was real lenient in only making it one year.
>
> * * * *

[1] "II-R." refers to the record in the court of appeals. The court of appeals has quoted some of this material. (Pet. iii, fn. 3.)

THE COURT: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here and, of course, that's the probation officer's point, that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate, so there isn't anything he can do and, further, probation has to be based upon trust and confidence and if she won't tell the truth to the probation officer or to the court, then there's no basis for probation.

That's why I think your argument should be limited to no sentence or a jail sentence. I don't think probation is indicated at all. I don't see what the probation officer could do to help her. You haven't told me.

* * * *

THE COURT: She wasn't denied probation on that ground. She was denied probation on the basis that there wasn't anything the probation officer could do to help her. There wasn't anything he could do.

* * * *

THE COURT: The probation officer just reached the conclusion that there wasn't anything he could do to help her when he said that probation should not be granted and you haven't told me anything the probation officer could do to help Mrs. Whitfield in this case.

In its opinion affirming the denial of petitioner's motion, the court of appeals concluded that there was no abuse of discretion in denying probation in this case, since petitioner would not admit wrongdoing, even after her conviction had been affirmed on appeal, and the purpose of probation is the rehabilitation of the offender (Pet. iv).

ARGUMENT

1. The basic question here is whether the district court, in determining whether or not to grant probation, could properly consider the fact that petitioner, whose guilt had been established to the satisfaction of the jury, the district court, and the court of appeals, nevertheless persisted in denying her guilt. We submit that the district court was justified in giving weight to such fact, and petitioner suggests no reason (Pet. 8-9) for thinking otherwise. The probation statute (18 U.S.C. 3651, *supra*, p. 2) "was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender." *Burns* v. *United States*, 287 U.S. 216, 220; *Berman* v. *United States*, 302 U.S. 211, 213. The statute itself declares that a district court *may* suspend sentence and grant probation "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." 18 U.S.C., Section 3651. Here, the district court declared no general rule that would require imposition of a prison sentence on all convicted defendants who persisted in denying their guilt. The judge determined only that, since petitioner refused to admit her guilt, no useful purpose would be served by placing her on probation. He clearly recognized that, even though he did not place petitioner on probation, he still had the option of not imposing a prison sentence. The fact that he determined that a one-year prison sentence was appropriate here does not evidence a general policy of impos-

ing prison sentences on all who refuse to admit their guilt.[2]

2. This case does not present the broad question of whether evidence "dehors the record" may be "reviewed" (Pet. 10) or considered for any purpose on a motion under Rule 35; it presents only the narrow question of whether a district court, on such a motion, must consider affidavit evidence designed to show that petitioner was wrongly convicted.[3] Clearly such evidence is irrelevant, since Rule 35 relates only to the validity of a sentence and is not a substitute for Rule 33 or for 18 U.S.C. 2255, which permit collateral attack on a judgment of conviction. On a motion to correct or reduce a sentence, the conviction itself is presumed valid. See *Hill* v. *United States*, 368 U.S. 424, 430;[4] *Petro* v. *United States*, 368 F. 2d 807,

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[2] This case is not in conflict with *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7). There, the district court refused to consider the possibility of probation because of its policy of denying probation in the case of any person who had chosen to go to trial rather than to plead guilty. Here, the district court simply determined that the particular case was one in which probation was not appropriate.

[3] The judgment of conviction became final upon affirmance on September 11, 1967 (*Whitfield* v. *United States*, 383 F. 2d 142 (C.A. 9)); petitioner could file such a motion even now, on the ground of newly discovered evidence, since Rule 33 allows "two years after final judgment" for that purpose.

[4] After the decision in *Hill* v. *United States*, *supra*, Rule 35 was amended February 28, 1966, to include the correction of sentences "imposed in an illegal manner" (in *Hill*, the petitioner was sentenced without opportunity to speak on his own behalf), but this amendment obviously does not reach the present case.

808 (C.A. 6); *United States* v. *Garfinkel*, 285 F. 2d 548, 551 (C.A. 7); *Gilinsky* v. *United States*, 335 F. 2d 914, 916 (C.A. 9).

Petitioner contends (Pet. 10-11) that there is a conflict as to whether Rule 35 permits a showing that false testimony was knowingly used to obtain the conviction, citing *Mooney* v. *Holohan*, 294 U.S. 103, *Black* v. *United States*, 269 F. 2d 38 (C.A. 9), and *Sears* v. *United States*, 265 F. 2d 301 (C.A. 5). But those cases are not in point since they involved either petitions for habeas corpus or petitions under 18 U.S.C. 2255. The decision here does not foreclose petitioner from seeking relief under either Rule 33 or Section 2255.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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